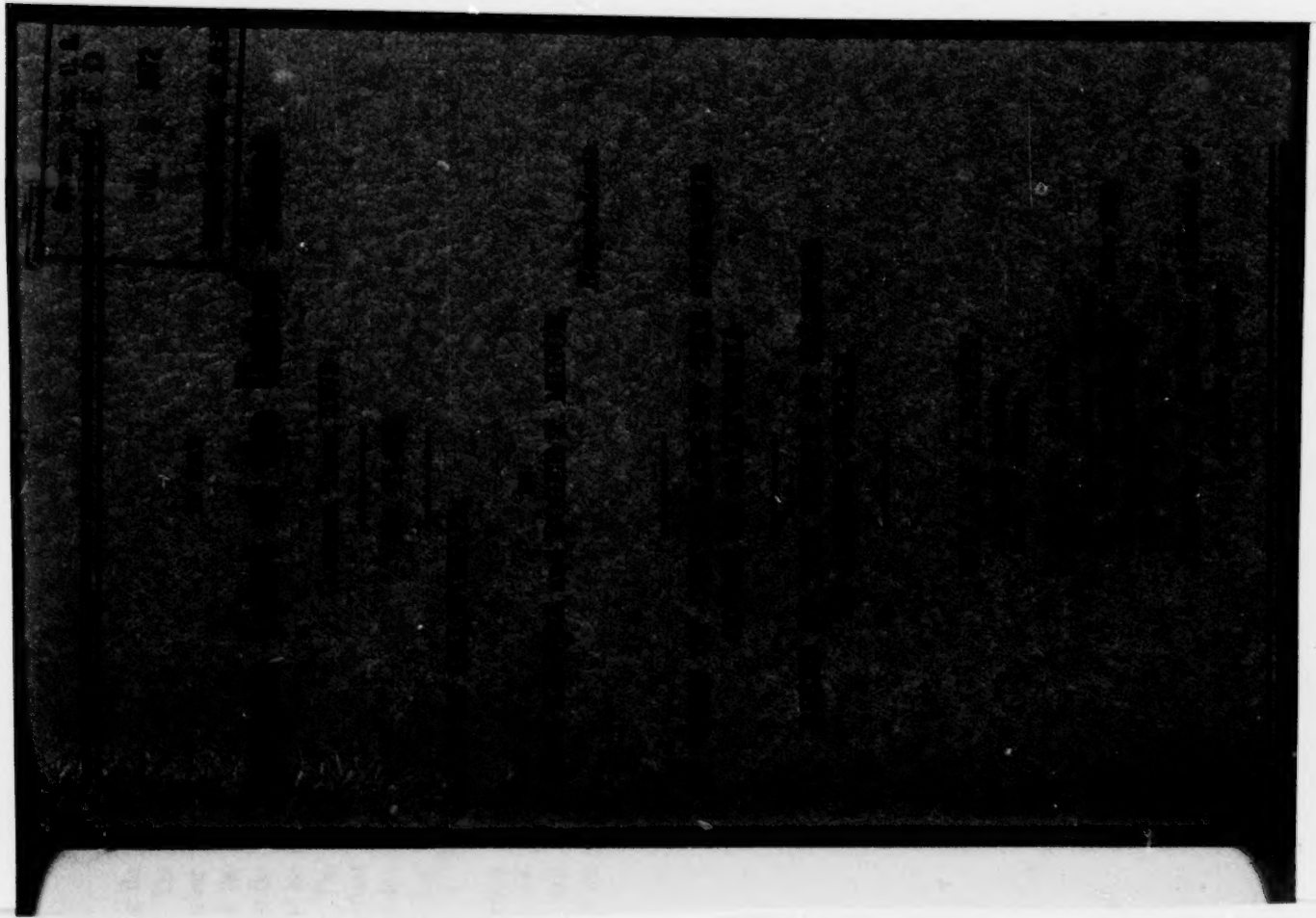


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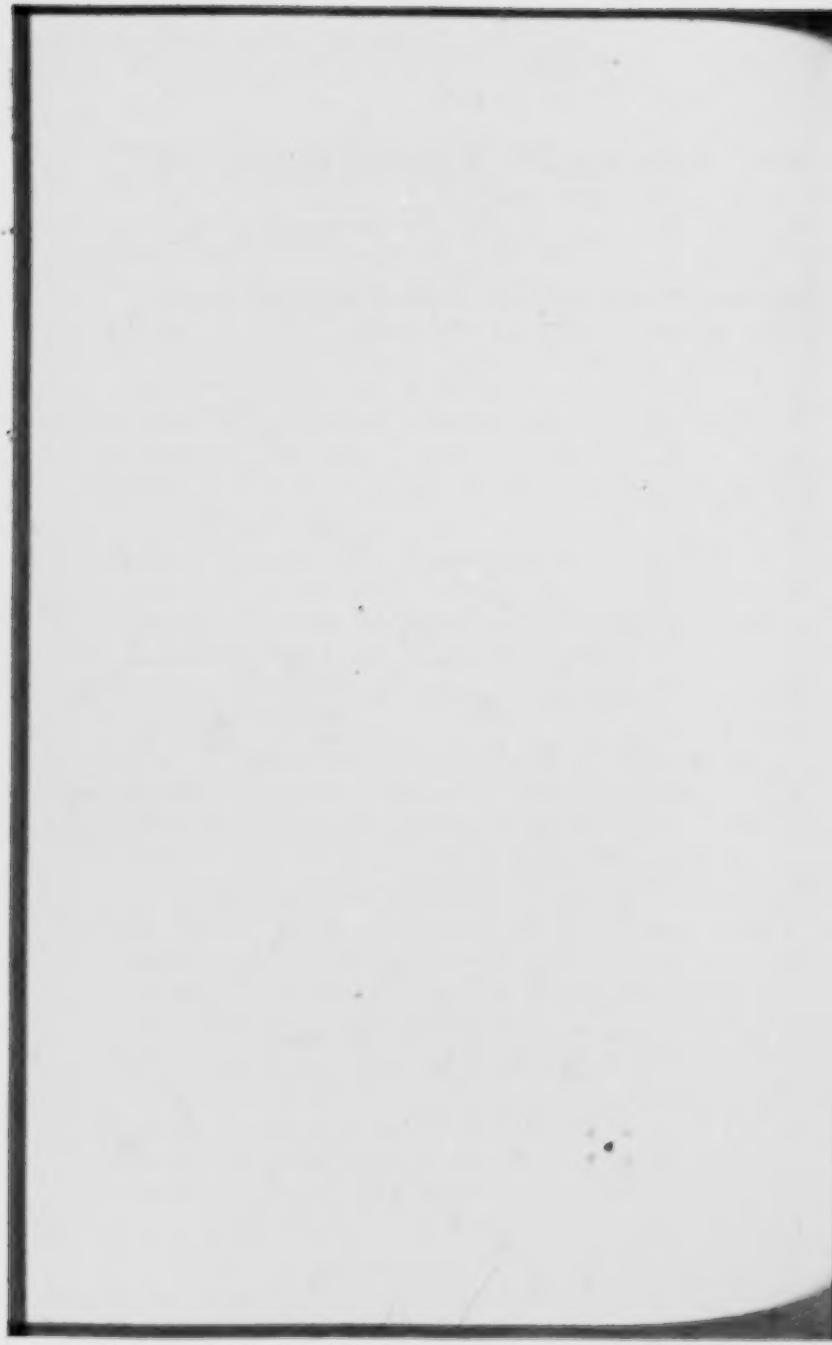
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-651

STATE OF CALIFORNIA,

Petitioner,

vs.

JUDITH KRIVDA and ROGER T. MINOR,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF OF THE STATE OF ILLINOIS AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The State of Illinois has a substantial interest in the scope and application of the exclusionary rule. In particular the Supreme Court of Illinois has always followed applicable federal precedents in search and seizure cases. The cognate provisions of the Illinois Constitution are construed as identical in scope and effect as the provisions of the Fourth and Fifth Amendments of the United States Constitution. See *People* v. *Grod*, 385 Ill. 584, 53 N.E. 2d 591 (1944). Initially, the Supreme Court of Illinois refused to apply the exclusionary rule. See *Trask* v. *People*, 151 Ill. 523, 529 (1894). After the adoption of the exclusionary rule in federal courts, the Illinois rule was changed in reliance upon the opinions of this Court. See *People* v. *Brocamp*, 307 Ill. 448, 138 N.E. 728 (1923); *People* v. *Castree*, 311 Ill., 392, 143 N.E. 112 (1924); *City of Chicago* v. *Lord*, 7 Ill. 2d 379, 130 N.E. 2d 505 (1955). It is therefore reasonable to assume that any change in the exclusionary rule made by this Court will affect directly the rules applied by the state courts.

THE RULE EXCLUDING EVIDENCE IMPROPERLY SEIZED SHOULD BE APPLIED ONLY WHEN THE SEIZURE CONSTITUTES A SUBSTANTIAL VIOLATION OF RIGHTS AND ONLY AFTER THE COURT WEIGHS THE QUESTION OF EXCLUSION IN LIGHT OF THE PUBLIC INTEREST IN OBTAINING RELIABLE EVIDENCE FOR THE PROSECUTION OF SERIOUS CRIMES OF VIOLENCE.

I

The exclusionary rule in search and seizure cases has been the subject of intense debate throughout its existence. The commentary is substantial.

The historical and logical foundations of the rule have been ably and persuasively criticized. See Wigmore, "Using Evidence Obtained by Illegal Search and Seizure", 8 A.B.A.J. 479 (1922); Plumb, " Illegal Enforcement of the Law", 24 Cornell L.Q., 337, 354-58, 370-81 (1939); Wigmore, *Evidence*, Secs. 2183-84a (McNaughton Rev. 1961). Nearly every civilized nation in the world has survived as a civilized nation without the benefit of the exclusionary rule. See "The Exclusionary Rule Under Foreign Law" 52 J. Crim. L. C. & P.S. 270 (1961). (series of articles). To our knowledge, no civilized nation has an absolute rule which mandates the exclusion of evidence regardless of social interests which support its admission. See *Lawrie* v. *Muir* [1950] Scots L.T.R. 37.

The policy arguments against the rule have been well stated. See Burger, "Who Will Watch the Watchman", 14 Am. U. L. Rev. 1 (1964); Oaks, Studying the Exclusionary Rule In Search and Seizure, 37 U. Chi. L. Rev. 665 (1970). And concern over the validity of the rule has not been confined to academicians, prosecutors and policemen in

recent years. See *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U.S. 388, 411 (1971) (Burger, C. J. dissenting); *Coolidge* v. *New Hampshire* 403 U.S. 443, 490, 493, 510 (1971) (Harlan, J. concurring) (Black and Blackmun, JJ, concurring and dissenting).

II.

At the risk of repeating what has been said before, we think it appropriate to restate our objections to the exclusionary rule.

On ethical grounds, the rule in its direct application, seems unfair. It benefits only the guilty. The innocent man whose rights are violated must sue civilly to secure damages; he must pursue a remedy that this Court has found to be ineffective. Further, the application of the rule punishes society and not the offending officer.

In terms of judicial administration, the rule requires diversion from the fundamental concerns of guilt or innocence. At the very least, the determination of the ultimate question is substantially delayed and witnesses for both sides become discouraged or unavailable. At the worst, counsel for defendants become so concerned with the question of suppression that they never seriously prepare for trial or explore defenses on the merits.

The public perception of the delay, the procedural gamesmanship and the clear benefit to the guilty serves to diminish confidence in the courts.

The exclusionary rule creates a haven for a corrupt policeman or prosecutor. The rule allows the officer to immunize an offender while appearing to do an aggressive job of law enforcement. An officer may conduct a massive gambling raid without securing adequate evi-

dence of probable cause. The officer appears to be doing his job cracking down on gambling only to be frustrated by the courts. The officer may reap both the benefits of public approval and consideration from the gambler. One study found that "an examination of the records and a period of observation of this practice in the court is fairly convincing that the raids are made to immunize the gamblers while at the same time satisfying the public that gamblers are being harassed by the police." Dash, "Cracks in the Foundation of Criminal Justice," 46 Ill. L. Rev. 385, 392 (1951). See also, Peterson, "Restrictions in the Law of Search and Seizure," 52 NW. L. Rev. 45, 57-58, 58-59 (1957). The courts are compromised by aiding this kind of corruption. And the courts, not the police, are the recipients of public disapproval when they suppress meaningful, or overwhelming evidence. The corrupt policeman blames the courts for his ineffectiveness and the Courts cannot respond.

The exclusionary rule is thought to deter illegal police conduct. There is no evidence that proves this is so. See Oaks, "Studying the Exclusionary Rule in Search and Seizure," 37 U. Chi. L. Rev. 665 (1970). The fact that there is no proof of deterrence should cause the rule to be abandoned. If due process requires the exclusionary rule, it would seem clear that the proponent of the rule ought to sustain the burden. It seems clear to us that even without statistics a realistic analysis of the incentives and pressures upon the police would show that the exclusionary rule cannot deter.

The primary pressure upon the police is to apprehend criminals and prevent crime. It is an unceasing public pressure which arises not from some irrational public prejudice but from the indisputable assessment that

crime is both an ethical and social evil.[1] Further, there is the internal standard of every ordinary man in law enforcement that murderers, robbers, etc., ought to be punished for their crimes. The effect of the exclusionary rule in search and seizure cases is not deterrence but perjury. The rule fosters false testimony by law officers who feel they must apprehend offenders and are fearful that minor technical errors will result in their escape. In short, police officers who would not alter their testimony in any respect to help the prosecution establish guilt may well be driven to such extremes when the question is not one of guilt but rather of the admissibility of reliable evidence.

There are institutional pressures which work against deterrence. The police organizational structure asks the policeman why he didn't arrest rather than why he did.[2] The police encourage seizure of contraband and place a premium on police alertness. The desire to prevent crime often causes the police to engage in practices which are not permitted when the object is the prosecution of offenders.[3] The police structure is responsive to public

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1. There are similar pressures upon courts to distort probable cause concepts in order to sustain the admissibility of evidence. See Brinegar v. United States, 338 U. S. 160, 183 (1949).

2. One eminent judge has adopted a standard for search and seizure which reflects this concern: "When a police officer could justifiably be disciplined for failure to act, his action can hardly be characterized as unreasonable." People v. Moore, 35 Ill. 2d 399, 403, 220 N. E. 2d 443, 445 (1966) (Schaefer, J.).

3. In this case the problem was present. According to both opinions in the case, the police were informed that

norms. The police do not feel morally blameworthy because the public does not condemn. See Skolnick, *Justice Without Trial,* 219-26 (1966). La Fave, "Improving Police Performance Through the Exclusionary Rule," 30 Mo. L. Rev. 391, 442-44 (1965).

It is this abiding, powerful and rational pressure to suppress crime that leads police to prefer, in many cases, to engage in the forbidden practices and forego prosecution. The Court has recognized the inability of the rule to deter in certain contexts. See *Terry* v. *Ohio,* 392 U. S. 1, 12-15 (1968). Studies have shown that the police have an incentive to arrest without any thought of conviction. An arrest disrupts illegal business and clears the streets for a time. Narcotics and weapons are destroyed and the arrestee bears the costs of freeing himself through court action. See La Fave, "Improving Police Performance Through the Exclusionary Rule," 30 Mo. L. Rev. 391, 422-29, 447-55 (1965); Waite, "Police Regulation by Rules of Evidence," 42 Mich. L. Rev. 679, 685-87 (1944). It is important to reiterate that the police do not act out of malice, they act because the public demands that they act and that demand is more forceful than the demands made by judges.

It is our view that the only effective control upon police conduct is the community in which the police function. Excesses and abuses of police power occur rarely because the citizens will not tolerate them, not because the police fear that months later a judge will suppress

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respondents were injecting respondent's two children with methedrine. Upon checking the premises the police did observe two children. There were additional circumstances which would lead any law officer to consider the necessity for prompt action to rescue the children even at the cost of ruining the prosecution.

evidence they seize. In our experience, the only effective means of changing police procedures which aggrieve segments of the community is by community pressure. The exclusionary rule has been in effect in Illinois since 1923 and yet there is no evidence that complaints concerning police abuses have diminished. In one city in Illinois, it is claimed that one minority group is persistently harassed by police. Though many allegations have proven unfounded, there have apparently been enough incidents to cause several changes in police procedure and high ranking personnel. The incentive for change was not a new rule of court or a far-reaching opinion but rather the pressure of citizens groups. In light of several recent jury verdicts acquitting unpopular defendants, it seems absurd to argue that the community will tolerate police excesses against minority groups.

In this connection, it is worth observing than an officer who acts in good faith is not going to be deterred by the exclusionary rule. See Horowitz, "Excluding the Exclusionary Rule," 47 L. A. Bar Bull. 91, 92 (1972). By definition, such an officer acts because he thinks, albeit mistakenly, that he is acting within the law. The officer who acts in bad faith will not be deterred either. "The officer who takes bribes or shakes down prisoners, or extorts money on threat of arrest, or brutally mistreats prisoners or otherwise consciously abuses his authority can be controlled only by the imposition of direct penalties . . . the exclusionary rule has no impact in such a situation." Barrett, "Exclusion of Evidence Obtained by Illegal Searches," 43 Calif. L. Rev. 565, 592-93 (1955).

The incentives and pressures which work against the exclusionary rule are not the only factors which account for its limited value as a tool of deterrence. The rule

itself is applied in a context inimical to its purposes. There is, first, a distinct failure to communicate the rules of search and seizure laid down by courts to the police in a manner comprehensible to the police. La Fave and Remington, "Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions," 63 Mich. L . Rev. 987, 991-93, 1003-1008 (1965). There is also the admitted failure of courts to prescribe consistent and comprehensible rules governing search and seizure. See *Coolidge* v. *New Hampshire,* 403 U.S. 443, 483 (1971). It may be inherently impossible to devise coherent Fourth Amendment precepts. If that is the case then the exclusionary rule is clearly out of place. It is unreasonable to expect deterrence when the subject does not know what he is forbidden to do. The lack of clarity in the law contributes to both public and police disrespect for the rules of search and seizure. Nothing is more incomprehensible to the policeman who accepts judicial supervision of searches by securing a warrant than to have another court say that the first court was wrong in issuing the warrant. See La Fave, "Improving Police Performance Through the Exclusionary Rule," 30 Mo. L. Rev. 391, 411-415 (1966).

There is a particularly striking and inexplicable anomaly in our treatment of police officers vis a vis lawyers. We excuse a lawyer who mistakenly judges a law to be constitutional and advises his client to plead guilty. See *Brady* v. *United States,* 397 U.S. 742, 756-757 (1970). Yet by a divided court we condemn a police officer who decides to search upon his mistaken judgment that he has met the requirements of the law. It is unfair to tax an officer, usually a layman, with the endless permutations of search and seizure law. The appearance to the officer is that the law is capricious and meaningless, an attitude which scarcely encourages eager compliance.

III.

Many who recognize the validity of objections to the rule will advocate that the rule not be abandoned until a reasonable alternative is provided. The most popular suggestion for an alternative is to provide a remedy reminiscent of Industrial Commission (Workmen's Compensation) procedures. See Horowitz, "Excluding the Exclusionary Rule, Can There Be an Effective Alternative," 47 Los Angeles Bar Bull. 91, 94 et seq. (1972); Barrett, Exclusion of Evidence Obtained By Illegal Searches, 43 Calif. L. Rev. 565, 594-95 (1955). *Bevins* v. *Six Unknown Fed. Narcotics Agents,* 403 U. S. 388, 422-23 (1971) (Burger C. J. dissenting).

It seems to us that concern over a viable alternative should not prevent this Court from reconsidering the exclusionary rule. If the exclusionary rule were effective and meaningful as a deterrent, it might be proper to ponder the necessity for replacing it with something else. But it appears that the exclusionary rule cannot and does not serve the purpose of deterrence. If the exclusionary rule has no deterrent effects, its absence will not leave a void to be filled. It might be said that an outright abolition of the exclusionary rule may have a symbolic effect and encourage police abuse. We doubt that this would occur. The public resentment of arbitrary police conduct is now and will remain the primary restraint on the police. Further, the continuation of the exclusionary rule will encourage the other police abuses attendant upon the administration of the rule.

This Court need not resolve the issues presented by a complete abandonment of the exclusionary. Instead, a more modest approach can and ought to be pursued.

The exclusionary rule in federal cases was adopted in *Weeks* v. *United States,* 232 U.S. 383 (1914). The crime there was use of the mails to transport lottery tickets. The police action there was conducted without any authority. It consisted of a complete search of the room of the defendant in his absence and a seizure of his private letters and correspondence and other private papers. Under the rule in *Boyd* v. *United States,* 116 U.S. 616 (1886), the seizure may well have violated the Fifth Amendment.

The exclusionary rule was imposed upon the States in *Mapp* v. *Ohio,* 367 U.S. 643 (1961). The conduct of the police in that case can properly be characterized as flagrant. The offense charged could not today be constitutionally classified as a crime. See *Stanley* v. *Georgia,* 394 U.S. 557 (1969). The Court held that it must exclude "evidence secured by official lawlessness in flagrant abuse of that basic right [of privacy]" 367 U.S. at 654-55.

The nature of police conduct in both *Weeks* and *Mapp* was exceptionally violative of the suspect's rights. Indeed, in neither case, did the officers attempt to defend their actions on the merits or as taken in good faith. No rationale appears in either case for applying the exclusionary rule to reasonable, good faith but erroneous action by the police.

Judge Friendly has suggested that "the object of deterrence would be sufficiently achieved if the police were denied the fruit of activity intentionally or flagrantly illegal—where there was no reasonable cause to believe there was reasonable cause." Friendly, *The Bill of Rights as a Code of Criminal Procedure,* 53 Calif. L. Rev. 929, 952 (1965). See also A.L.I. *Model Code of Pre-Arraignment Procedure,* §8.02 (2) (Tent. Draft No. 4, 1971). It

appears to us at least that this is what *Mapp* said. When Mr. Justice (then Chief Judge) Cardozo rejected the idea that the criminal should go free because the constable "blundered"[4] he meant exactly what he said. A blundering constable was not the subject of *Mapp*, rather there a deliberate, methodical violation of a suspect's rights was involved.

The exclusionary rule ought to be applied also in light of the severity of the crime involved. Justice Cardozo's opinion in *People* v. *Defore* is often cited but there is significant language in the opinion of Justice Finch in the Appellate Division opinion:

> "To be unable to find a murderer guilty, although competent evidence is before the court to warrant a conviction, for the reason that someone else is guilty of petty larceny in connection with obtaining such evidence seems a handicap rather than a help to the administration of justice." *People* v. *Defore*, 213 App. Div. 643, 652; 211 N.Y.S. 134, 142 (1925).[5]

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4. People v. DeFore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

5. " . . . judicial exceptions . . . should depend somewhat upon the gravity of the offense. If we assume, for example, that a child is kidnapped and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be a drastic and undiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger. Brinegar v. United States, 338 U.S. 160, 183 (Jackson J. dissenting).

The ethical quandary posed by the application of the exclusionary rule without regard to the nature of the crime involved is a significant one. "However much we may be revolted by the methods used by the police to obtain the evidence we cannot rationally say that the defendant whose crime may be at least equally revolting should have a personal right to go free as a result." The exclusionary rule assumes "that the policeman's action always involves a greater social evil than the defendant." Barrett, *Exclusion of Evidence Obtained By Illegal Searches,* 43 Calif. L. Rev. 565, 581 (1955).

In this case, the crime does not involve violence nor is it an offense against the person. We would freely admit that the offense in this case would not be a factor requiring the relaxation of the exclusionary rule. Nevertheless, it is a factor that ought to be considered whether it weighs in favor of the prosecution or the defense.

The other factor that ought to be considered is the nature of the police conduct. In this case, it is clearly inappropriate to characterize the police conduct as flagrant, deliberately abusive of basic rights or intentionally violative of obvious rules governing search and seizure.[6] It is difficult to characterize police conduct approved by three judges of the California Court of Appeal and three justices of the California Supreme Court as flagrant and obviously illegal.

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6. This assumes, arguendo, that the trash was protected by the Fourth Amendment. On that issue we agree with the petitioner and join its argument. See United States v. Jackson, 448 F. 2d 963, 971 (9th Cir. 1971).

It has never been adequately explained why a case like *Mapp* involving extremely flagrant police misconduct used for the prosecution of the most trivial offense leads to the suppression of evidence seized with probable cause in good faith reliance upon a statutorily authorized warrant used for the prosecution of murder as in *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971). Without that explanation the rule should never have been extended to its present breadth.

We do not ask now for the overruling of *Mapp;* we ask that the exclusionary rule be limited to those cases like *Mapp* which caused the rule to be promulgated. The exclusionary rule has assumed a scope far beyond the justifications offered when it was put upon the States. There is no valid rationale for its automatic extension to all classes of cases regardless of the nature of the police conduct and the gravity of the crime. As a minimum measure, the reach of the rule should be reduced to conform with the reasons offered for the rule in *Mapp*.

CONCLUSION

The People of the State of Illinois, as amicus curiae, respectfully urge the reversal of the judgment below and the adoption of the suggested modifications of the rule in *Mapp* v. *Ohio*.

Respectfully submitted,

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